

1 UNITED STATES BANKRUPTCY COURT  
2 EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

3 IN THE MATTER OF, Case No. 13-53846  
4 CITY OF DETROIT, MI Detroit, Michigan  
August 5, 2015  
\_\_\_\_\_/ 2:13 p.m.

5  
6 IN RE: BENCH OPINION RE: (#9970) CITY OF DETROIT'S MOTION FOR  
7 THE ENTRY OF AN ORDER (I) ENFORCING THE PLAN OF ADJUSTMENT  
8 INJUNCTION AND (II) REQUIRING THE DISMISSAL OF THE STATE COURT  
9 ACTION FILED BY TANYA HUGHES, AND EXPEDITED HEARING RE:  
10 (#10087) CITY OF DETROIT'S MOTION FOR THE ENTRY OF AN ORDER  
11 (I) ENFORCING THE PLAN OF ADJUSTMENT INJUNCTION AND (II)  
12 REQUIRING B & C LAND DEVELOPMENT CORPORATION TO (A) DISMISS  
13 WITH PREJUDICE ITS STATE COURT LAWSUIT AND (B) WITHDRAW ITS  
14 NOTICE OF LIS PENDENS.

15 BEFORE THE HONORABLE THOMAS J. TUCKER  
16 TRANSCRIPT ORDERED BY: ROBIN WYSOCKI

17 APPEARANCES:

18 For the City of Detroit, MI: MARC SWANSON, ESQ. (P71149)  
19 JONATHAN GREEN, ESQ. (P33140)  
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For Tanya Hughes: JEFFREY ELLISON, ESQ. (P35735)  
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For B & C Land Development Corporation: HORACE COTTON, ESQ. (P33268)  
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Court Recorder: Jamie Laskaska  
Transcriber: Deborah L. Kremlick

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1 (Court in Session)

2 THE COURT: All right. We'll we're ready to call  
3 the City of Detroit case and the matters we have scheduled for  
4 -- in that case today.

5 THE CLERK: The Court calls the City of Detroit,  
6 Michigan. Case number 13-53846.

7 THE COURT: All right. Good afternoon. Let's have  
8 appearances, please.

9 MR. SWANSON: Your Honor, it's Marc Swanson and  
10 Jonathan Green on behalf of the debtor the City of Detroit.

11 MR. ELLISON: Afternoon, Your Honor. Jeffrey  
12 Ellison for Tanya Hughes.

13 THE COURT: All right. We have two matters  
14 scheduled for hearing today, one of which is the Tanya Hughes  
15 matter. So we will go ahead with that first. And it's listed  
16 as the first matter anyway on the Court's calendar.

17 So this is a -- originally after the July 15<sup>th</sup> hearing the  
18 Court held in which the Court heard oral argument from counsel  
19 for these parties regarding the City of Detroit's motion for  
20 entry of an order enforcing the plan of adjustment and  
21 injunction, et cetera concerning the State Court action filed  
22 by Tanya Hughes.

23 The Court originally took the matter under advisement and  
24 said the Court would issue a bench opinion -- actually it came

25 under advisement when the supplement filings that the Court

1 ordered on July 15 were -- were filed. But the Court  
2 scheduled today for a bench opinion hearing to rule on the  
3 motion.

4 Since that time as the parties know, the parties filed a  
5 stipulation asking the Court to enter an order permitting the  
6 debtor and Ms. Hughes through counsel to present as they put  
7 it, limited oral argument on the supplemental filings as  
8 defined in the stipulation today and I -- I granted that and  
9 entered the order granting that.

10 So we start at least with the -- some further oral  
11 argument regarding the city's motion which the parties wish to  
12 make in light of the supplemental filings that have been filed  
13 since the July 15<sup>th</sup> hearing and that's fine, we'll hear that.  
14 I'm not guaranteeing at this moment that I'm going to actually  
15 issue a bench ruling when you get done with that argument  
16 rather than doing it on another day, but we'll -- we'll see.  
17 So go ahead. We'll hear from the parties. I guess unless the  
18 parties have a different order in mind, we'll hear first from  
19 the debtor, the moving party.

20 MR. SWANSON: Thank you, Your Honor. And at least  
21 the city included the limited portion because it -- it -- it  
22 intends to be brief.

23 The -- the supplemental filings were attached to the  
24 city's supplement filed at docket number 10099 included the  
25 police trial board decision which the Court requested, the

1 arbitration ruling, and then the relevant provisions of the  
2 CBA.

3       Additionally attached as Exhibit A to the stipulation  
4 filed at docket number 10109 was a proof of claim that was  
5 filed by the DPLSA on behalf of certain individual members  
6 including Ms. Hughes.

7       The city believes that these documents reinforce and  
8 support the city's position that the claim arose pre-petition,  
9 either under the debtor's conduct or the fair contemplation  
10 approach.

11       First, this claim is consistent with and supports the  
12 city's view that -- that this is a pre-petition claim. The  
13 claim shows that the claims arising from her termination were  
14 within the fair contemplation of her union and should also  
15 have been in the -- within her fair contemplation. Filing of  
16 the claim is exactly what should have happened and what in  
17 fact did happen.

18       And that -- in this regard the claim states on Exhibit  
19 1B, that it was her termination for -- that the grievant was  
20 terminated for a refusal to submit to a drug screen. And on  
21 Exhibit 1 to the claim the -- it acknowledges that the claim  
22 is filed as a protective measure, in event that any of the  
23 claimants on the list attached hereto have monetary claims  
24 against the city arising from the resolution of the  
25 disciplinary action.

1 Footnote 1 to Exhibit 1 also states that resolution of a  
2 disciplinary action may result in the DPLSA member having a  
3 claim against the city. That's exactly what is alleged here.  
4 And -- and second, the city wanted to make clear that in light  
5 of this claim it's not asking for Paragraphs 3 and 4 of the  
6 relief requested in its original motion and has stipulated to  
7 that fact.

8 THE COURT: So basically what you're seeking now is  
9 only the --

10 MR. SWANSON: The --

11 THE COURT: The order that -- the injunctive  
12 provision regarding the State Court lawsuit.

13 MR. SWANSON: Yes. The only thing that we're  
14 seeking here today, Your Honor -- I guess two things. One,  
15 we're seeking a determination that the claim as alleged in the  
16 State Court lawsuit arose pre-petition. And that claim is  
17 enjoined or -- or Ms. Hughes to be exact, is enjoined from  
18 pursuing that claim under the plan injunctive provisions.

19 And we would seek an order which requires Ms. Hughes to  
20 dismiss her lawsuit against the city with prejudice and -- and  
21 she has whatever rights she and the DPLSA have under this  
22 proof of claim and -- and the city is not asking the Court to  
23 obviously make any sort of determination, or ruling, or -- or  
24 anything like that on -- on the claim. And that's all the

25 city has, Your Honor. Thank you.

1 THE COURT: All right. Mr. Ellison.

2 MR. ELLISON: Yes. Thanks very much, Your Honor.

3 Your Honor posed a question during oral argument when we were  
4 last here as to whether this was a termination of Sergeant  
5 Hughes that occurred in October or thereabouts of 2012, but a  
6 termination that could not be fully implemented until the  
7 arbitrator ruled, or was it instead an initiation of an effort  
8 to remove Sergeant Hughes from the work force that did not  
9 actually turn into a termination until the arbitrator ruled.

10 The distinction being that what -- what type of claim was  
11 -- or what type of action against Sergeant Hughes was  
12 initiated. And I think the documents that have been presented  
13 to Your Honor by stipulation bear on that question and  
14 demonstrate the she was not fired by the Chief of Police  
15 pre-petition. She was not fired until December 16 of 2014  
16 which was after the eighth amended adjustment plan was  
17 approved by the Bankruptcy Court.

18 The -- the documents that bear this out, Your Honor, the  
19 trial board decision which is in transcript form, and this is  
20 docket number 10099 and it's Page 5 of the transcript. It  
21 says, quote -- it's a cover letter actually to the transcript.

22 It says, "attached hereto is the recommendation of the  
23 police trial board in the matter of Tanya Hughes. And the  
24 recommendation is that she be -- be dismissed from the Detroit  
25 Police Department".

1 Then the transcript itself says on Page 8 of the filing  
2 beginning on Line 11, "as it relates to the decision of the  
3 trial board, I, commander James White as chairperson,  
4 recommend a penalty of dismissal from the Detroit Police  
5 Department".

6 So the -- the trial board itself is making a  
7 recommendation, they're not making a decision. The  
8 arbitrator's decision on Page 55 of the filing, Your Honor,  
9 again this is docket 10099, Page 55, the arbitrator's decision  
10 issued December 15, 2014, so nearly two years later following  
11 the trial board decision says, "in recommending the penalty of  
12 dismissal, the trial board considered the nature of the  
13 misconduct along with Sergeant Hughes' spotless disciplinary  
14 history".

15 And then the arbitrator went on to say, "considering the  
16 gravity of the charges, this arbitrator cannot find that the  
17 department violated concepts of just cause and reasonableness  
18 in reaching this determination".

19 Again, the -- the recommendation. So when did the  
20 recommendation turn into an actual decision. And I would  
21 submit to Your Honor that that happened when the arbitrator  
22 said that the recommendation was consistent with just cause.

23 If you take a look at the collective bargaining agreement  
24 provisions, Page 59 of the filing says that Article 5, Section

25 D. "the department reserves the right to discipline and

1 discharge for just cause". That is the contractual language  
2 that gives the department the right to fire.

3 Article 10, Section A --

4 THE COURT: Wait a minute. I'm looking at Page 59.

5 MR. ELLISON: Yeah.

6 THE COURT: Where is that?

7 MR. ELLISON: I -- I believe I have it right.

8 THE COURT: I'm sure it's there, but I just --

9 MR. ELLISON: It's Section D, Your Honor.

10 THE COURT: Oh, I see. The first sentence in D.

11 MR. ELLISON: The first sentence, yes. And then on  
12 Page 59, Your Honor, in Article 10, Section A(3), it lays out  
13 what the trial board's responsibility is.

14 It states, "the trial board shall serve an investigatory  
15 role. It will not issue a penalty but will make a penalty  
16 recommendation to the Chief of Police; and the discipline  
17 decision rendered in the chief's hearing shall be the final  
18 ruling by senior management of the department". That's on  
19 Page 64 of the filing.

20 Now, there's nothing that's been submitted to Your Honor  
21 that the chief actually made a decision. And I --

22 THE COURT: I was going to ask about that. I  
23 noticed the provision in the collective bargaining agreement  
24 on Page 65, talks about Section 4, a chief's hearing and ends  
25 up by saying the decision of the Chief of Police should be the



1 final department administrative remedy. The Chief of Police  
2 shall notify the employee in writing forthwith. There's no  
3 such writing presented.

4 MR. ELLISON: Correct.

5 THE COURT: The parties don't have one? There isn't  
6 one?

7 MR. ELLISON: I believe there is not one, Your  
8 Honor. I believe that the chief did not issue anything in  
9 writing. And I think that is consistent with the appeal to  
10 arbitration which is at Article 9, Section A(1) which is on  
11 Page 61 of the filing.

12 And that says, "such written notice of intent to  
13 arbitrate must be made within 20 calendar days after receipt  
14 of the fourth step answer or trial board finding".

15 So the time for proceeding to arbitration runs from when  
16 the trial board makes its finding, not any appeal from a trial  
17 board to a chief's hearing. You note the language that you  
18 found on Page 65 of the filing that gives the chief the right  
19 to consider what the trial board has found, accept it in toto,  
20 modify it, reject it, conduct a new de novo proceeding himself  
21 if that's what the Chief of Police decides to do, yet the  
22 appeal to arbitration language doesn't run from what the chief  
23 does, it runs from what the trial board has done.

24 And so what we have in front of the Court is the trial

1 a recommendation of the trial board and the arbitrator  
2 determines based on that recommendation that the  
3 recommendation is consistent with just cause.

4 And the timing here, Your Honor, is the most important  
5 issue. The timing coming when the arbitrator rules and the --  
6 the following day, December 16 of 2014 is the day that  
7 Sergeant Hughes for the first time suffers adverse employment  
8 action.

9 And I would submit, Your Honor, that based on this  
10 additional information that's been provided to the Court that  
11 the underlying act then converts to the determination of the  
12 arbitrator which is December 15 of 2014.

13 THE COURT: Is there actually a termination at all  
14 under the collective bargaining agreement terms before the  
15 Chief of Police has issued a written decision?

16 MR. ELLISON: I'm sorry, Your Honor.

17 THE COURT: The Chief of Police makes the decision  
18 whether or not to terminate subject to whatever appeal rights  
19 there are. Without such a decision is there actually even a  
20 termination yet?

21 MR. ELLISON: As -- as of today --

22 THE COURT: Yeah.

23 MR. ELLISON: -- Your Honor? Yes, there is, Your  
24 Honor. When -- when the arbitrator issues the decision saying  
25 that the recommendation of the trial board for dismissal is

1 consistent with just cause, the arbitrator says termination is  
2 what happens.

3 THE COURT: Is that what this arbitrator said?

4 MR. ELLISON: Yeah.

5 THE COURT: Where did the arbitrator say the  
6 employee is terminated?

7 MR. ELLISON: The arbitrator says --

8 THE COURT: It says a dismissal of Sergeant Hughes,  
9 et cetera, is hereby affirmed.

10 MR. ELLISON: Correct.

11 THE COURT: If you think that's the -- that award  
12 language, Page 44 of the arbitrator's decision when that was  
13 issued on December 15, 2014 that constitutes the moment in the  
14 event of termination?

15 MR. ELLISON: That's correct, Your Honor. And prior  
16 to that what we have under the language of the collective  
17 bargaining agreement, again Article 10, Section A(3) on Page  
18 64 is a referral to a trial board.

19 It indicates -- and I'll read the language rather than  
20 attempt to recall it. "When serious charges are made against  
21 an employee, and again this is the second sentence of that  
22 section, "when serious charges are made against an employee,  
23 the matter may be referred to a trial board".

24 So that's without a determination being made. It's just  
25 a serious charge. Disciplinary administration section,

1 perhaps the Chief of Police, whoever it is that determines  
2 whether charges are serious within the meaning of that  
3 language, it's clearly a department function.

4 But once it's referred to the trial board, then the trial  
5 board language takes over and that gives the trial board the  
6 right to investigate, but not issue a penalty. They can make  
7 a recommendation, but -- but can't issue the penalty.

8 So the determination of dismissal happens December 15 of  
9 2014 when the arbitrator rules and the -- the decision that  
10 the arbitrator issues on that date is implemented the next  
11 day, December 16. And that's the day that Sergeant Hughes is  
12 removed from the payroll.

13 Now with respect to the claim that's filed by the DPLSA,  
14 Your Honor may be aware of some of the background information  
15 that gave rise to that claim. There was a stipulation entered  
16 into between the city and various public safety unions which  
17 is docket number 2667 filed February 7 of 2014 concerning --  
18 the principal concern there related to defense and  
19 indemnification claims.

20 When an officer is accused of conduct giving rise to an  
21 injury to a citizen known in common parlance as police  
22 brutality for instance, the -- the citizen will sue the  
23 officer and will also sue the city. The officer of course is  
24 not in bankruptcy. The officer has a claim against the city

1 of Detroit.

2 And the public safety unions were concerned that the  
3 officers who face potential claims would be left high and dry  
4 without defense and indemnification. And so this stipulation  
5 was reached through mediation and resulted in an order which  
6 is docket number 2678 which gave the public safety unions the  
7 right to file omnibus claims on behalf of any member of their  
8 associations that they could identify for a potential defense  
9 and indemnification. And again --

10 THE COURT: But that's not what the claim is that  
11 was filed by --

12 MR. ELLISON: I understand, Your Honor.

13 THE COURT: Excuse me, by the association on behalf  
14 of Tanya Hughes.

15 MR. ELLISON: Right. But --

16 THE COURT: It says nothing about indemnification.

17 MR. ELLISON: There -- there -- there is a -- there  
18 is a paragraph within the stipulation. Sub paragraph H on  
19 Page 4 of the stipulation. It's -- and again the stipulation  
20 is docket 2667.

21 That states, "there also are potential claims of public  
22 safety union members as a result of disciplinary action  
23 instituted against such member by the city". And the  
24 paragraph goes on, and the -- the stipulation thus gave --

25 gave the public safety unions the right to file claims on  
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1   behalf of any person within their individual associations that  
2   was facing potential disciplinary action.

3           And the claim that was filed by the DPLSA related to  
4   disciplinary action. I believe Your Honor has as part of this  
5   record, listing three individuals, Victor Jones, Tanya Hughes,  
6   and Donald Johnson. Victor Jones, a discipline filed that  
7   commenced in calendar 2010. Tanya Hughes, a discipline filed  
8   that commenced in calendar 2012. And Donald Johnson, a  
9   demotion filed.

10          Donald Johnson had been an inspector represented by the  
11   Command Officer's Association. He had been demoted into the  
12   DPLSA and there was a proceeding pending seeking to get him  
13   re-promoted and get him the difference in the compensation  
14   between the two ranks.

15          As far as I can tell, the -- what -- what the DPLSA put  
16   in the claim with respect to Tanya Hughes, they asked for  
17   reinstatement and back pay. She -- she didn't need  
18   reinstatement at the time the claim was filed because she  
19   hadn't been dismissed. And she had no back pay due and owing  
20   to her because she was receiving full compensation in a  
21   suspended with pay status.

22          So I -- I think that the claim that was filed by the  
23   DPLSA does not go to the issue that's before Your Honor and  
24   that is whether it was within the fair contemplation of

1 Civil Rights Act for pregnancy discrimination or disability  
2 discrimination arising from the order in October 2012 that she  
3 completely disrobe before delivering a urine specimen at a  
4 drug testing event.

5 Under the Signature Combs case as I've argued previously,  
6 Your Honor, a claim for bankruptcy purposes arises if the  
7 potential claimant knows that they have a claim and knowledge  
8 of that is acknowledged to a certainty. And here Sergeant  
9 Hughes didn't know even if she was going to be fired as a  
10 result of this let alone whether she would have a claim under  
11 the Elliott-Larsen Civil Rights Act arising from such  
12 dismissal.

13 THE COURT: Well, Tanya Hughes did not sign this  
14 proof of claim or file it?

15 MR. ELLISON: Correct. And in fact we did not know  
16 about it.

17 THE COURT: Is that correct?

18 MR. ELLISON: That is correct, Your Honor.

19 THE COURT: She didn't do it.

20 MR. ELLISON: Sergeant Hughes didn't know about it.

21 THE COURT: It was -- it was filed by the Detroit  
22 Police Lieutenants and Sergeants Association.

23 MR. ELLISON: Correct.

24 THE COURT: Right? Under -- under an order of this  
25 Court that authorized that association to file claims like

1 this.

2 MR. ELLISON: Correct.

3 THE COURT: And the proof of claim says in Exhibit 1  
4 it's without prejudice to claimant's ability -- I'm sorry,  
5 there's something in the order or in the -- yeah, it says it's  
6 -- it's without prejudice to the individual member to assert  
7 claims on their own behalf.

8 MR. ELLISON: Correct.

9 THE COURT: All right. Well, what else did you want  
10 to say, anything?

11 MR. ELLISON: That's all I have, Your Honor. Thank  
12 you.

13 THE COURT: All right. Thank you. Mr. Swanson, as  
14 usual as counsel for the moving party, I'll let you briefly  
15 reply if you want to. Anything further you'd like to say?

16 MR. SWANSON: Thank you, Your Honor. I think we  
17 need to -- to go back to the definition of -- of claim under  
18 the Bankruptcy Code. And -- and realize that Congress broadly  
19 defined claim and gave it the broadest possible definition.

20 When the termination was filed and when it occurred is --  
21 is not all together relevant here. We know that the conduct  
22 occurred pre-petition, there were numerous proceedings  
23 initiated pre-petition, and this claim was within Ms. Hughes'  
24 fair contemplation before the filing of the case. Thank you.

25 THE COURT: All right. Thank you both.



1 I'm -- I'm not going to issue a bench opinion at this  
2 moment ruling on this motion or the -- the motion as it has  
3 now been modified in terms of the relief the city is -- is  
4 seeking. Instead I'm going to schedule this for a bench  
5 opinion to be given on the next day when I have City of  
6 Detroit hearings which is August 26 at 1:30 p.m.

7 I've got a couple of matters in this case already  
8 scheduled for that day. I'm out of town much of the next two  
9 weeks anyway. So I couldn't really do it before then.

10 I do want to take a bit more time to think about the  
11 arguments of the parties and the authorities the parties cite  
12 and the issues here before ruling. But I'll -- I'll do it on  
13 August 26 at 1:30. Now, does that date and time work on  
14 counsels' calendars. Mr. Swanson, Mr. Ellison.

15 MR. ELLISON: Yes, Your Honor. For Tanya Hughes it  
16 does.

17 MR. SWANSON: Your Honor, I -- I cannot make it here  
18 that day but -- but Mr. Green will be here.

19 THE COURT: Oh, okay. So the city has no problem  
20 with me doing it then as opposed to --

21 MR. SWANSON: No problem.

22 THE COURT: All right. Okay, very good. So that's  
23 -- that's it for today on that matter. The -- let's hear the  
24 next matter which is the expedited hearing on the City of

1 lawsuit in State Court.

2 'All right. This hearing on the city's motion is docket  
3 number 10087. The motion for entry of an order enforcing the  
4 plan of adjustment injunction and requiring B & C Land  
5 Development Corporation to dismiss with prejudice its State  
6 Court lawsuit and withdraw its notice of lis pendens.

7 I -- I did review the papers filed by the parties  
8 concerning this motion and their exhibits. We'll start with  
9 counsel for the moving party. Mr. Swanson, you're going to  
10 argue it?

11 MR. SWANSON: Yes, Your Honor.

12 THE COURT: All right. Well, let's have  
13 appearances. You've already entered an appearance. Counsel  
14 for B & C.

15 MR. COTTON: May it please the Court, Horace Cotton  
16 appearing on behalf of B & C.

17 THE COURT: All right. Thank you. Good afternoon  
18 to everyone. Go ahead then, Mr. Swanson.

19 MR. SWANSON: Thank you, Your Honor. The matters in  
20 dispute here are one, does B & C Land have a contract with the  
21 city. Did it ever have a contract with the city.

22 And two, if this Court were to find that there was a  
23 contract which the city does not believe is the case, is B & C  
24 Land prohibited from suing on that contract because it's

25 barred by the Michigan statute of limitations.

1        If this Court were to answer either of these questions in  
2 the city's favor, the Court should enter the order requiring  
3 the dismissal of the State Court lawsuit and the withdrawal of  
4 the lis pendens.

5            THE COURT: Was the lis pendens notice filed only in  
6 the Circuit Court in the lawsuit, or was it filed separately  
7 in the Register of Deeds office? Do you know?

8            MR. SWANSON: I don't know, Your Honor. I would --

9            THE COURT: Okay. Well, go ahead.

10          MR. SWANSON: Your Honor, I wanted to provide a  
11 little background on -- on this piece of property and -- and  
12 the facts at least as B & C has -- has alleged them to be.

13          First though, B & C alleges that there was a contract in  
14 -- in 2006 between the city and B & C to sell real property.  
15 B & C alleges that on May 21, 2008, the contract was breached  
16 because that property which was subject to the alleged  
17 contract was instead transferred to the Detroit Waterage or --  
18 Detroit Water Sewerage Department, the DWSD.

19          Now in February of 2015, the city received two purchase  
20 offers for this property and on June 30<sup>th</sup>, 2015, the Detroit  
21 city council passed resolutions approving both of these  
22 purchase offers -- offers. And the Mayor has subsequently  
23 approved them as well.

24          The city and the purchasers desired to complete the sale  
25 of these properties as soon as possible and the day after the

1 city council approved these resolutions B & C filed a  
2 complaint in Wayne County Circuit Court alleging that it had a  
3 contract to purchase the same property that was approved by  
4 city council and -- and sued for breach of contract.

5 Now, Your Honor, B & C does not have a contract and it  
6 has never had a contract with the City of Detroit. To support  
7 its argument that there is a contract, B & C attached a cover  
8 letter and a document entitled offer to purchase. These  
9 documents appear at docket number 10087 from Pages 35 to 43.

10 The cover letter to the offer to purchase is instructive  
11 and -- and important. Because it provides on Page 3, upon  
12 receipt of the above, referring to the offer to purchase, we  
13 shall review your proposed development package. If  
14 acceptable, we shall follow our standard procedure for sale of  
15 surplus property by development agreement to obtain city  
16 council authorization to execute an agreement to purchase and  
17 develop the property.

18 Now this language was included on the cover letter, Your  
19 Honor, because the city's charter provides in Section 4-112  
20 that "except as otherwise provided by this charter, the city  
21 may not sell or in any way dispose of any property without the  
22 approval by resolution of city council".

23 And, Your Honor, city council never approved this offer  
24 to purchase. And B & C does not allege otherwise. In fact,

1 of B & C's own complaint, it says that the city breached the  
2 purported contract by "failing and refusing to present the  
3 development agreement to city council for final approval".

4 This -- this conclusion is also supported by the  
5 declaration of Mr. James Nosedo who filed a declaration in  
6 support of the city's reply where he certified that he has  
7 searched the city council records for resolutions on -- on  
8 this piece of property and there has never been a resolution  
9 approving any sale of property -- any sale of this property to  
10 B & C or its President Mr. Carmack.

11 Your Honor, this is not the first time that B & C has --  
12 has -- has alleged that they're -- alleged that they're a  
13 party to a contract with the city. And as we attached as an  
14 Exhibit 6D to our original motion, the city has consistently  
15 maintained over the years that there is not a contract and  
16 that there has never been a contract.

17 In fact in May 2012, Robert A. Anderson, the director of  
18 the city's planning and development department issued a public  
19 statement to the Detroit city council. Because Mr. Carmack  
20 has repeatedly been in front of the city council alleging that  
21 he had a contract.

22 When he explained that P & DD never took a deposit, the  
23 planning and development department never took a deposit from  
24 Mr. Carmack for the site, never entered into a purchase

1 into a development agreement with Mr. Carmack for the site.

2 Planning and development department never requested that  
3 this honorable body approve any sale of the site to Mr.  
4 Carmack and your honorable body never passed a land sale  
5 resolution or authorized the sale of the property to Mr.  
6 Carmack.

7 Thus, Your Honor, the law provides that for the offer to  
8 purchase to be a valid contract the city council had to  
9 approve it. The facts here are undisputed that the city  
10 council never approved the contract thus the only conclusion  
11 that this Court could reach is that there is no contract.

12 THE COURT: And therefore you're saying there was no  
13 executory contract to be assumed or rejected or otherwise  
14 treated under the plan or otherwise.

15 MR. SWANSON: Yes, Your Honor.

16 THE COURT: I -- I gather from that also that you're  
17 arguing that to the extent there is -- there are any claims  
18 based on these pre-petition events other than a breach of  
19 contract claim and that's -- I don't -- I'm not sure that's --  
20 any such other claims are asserted in the complaint in State  
21 Court, that those are clearly pre-petition claims that are  
22 covered by the plan's discharge and injunction relief.

23 MR. SWANSON: That's correct, Your Honor.

24 THE COURT: Okay, go on.

1 believes there's overwhelming evidence here that there is no  
2 contract if -- if the Court were to find a contract again by  
3 B & C's own admissions, the statute of limitations period to  
4 enforce that contract has run.

5 As I stated in -- in -- in my introduction, B & C alleges  
6 that on May 21, 2008, the city breached this alleged contract  
7 by transferring the subject property to the DWSD. And -- and  
8 there are certainly allegations in the complaint which would  
9 support a conclusion that -- that B & C is alleging that the  
10 breach occurred at -- at an earlier date.

11 But even if we take the farthest possible date May 21,  
12 2008 as alleged by B & C, if you apply a six year statute of  
13 limitations which applies to contracts and contracts to  
14 purchase real property, the statute would have run during the  
15 city's bankruptcy case under 108(c) would have been extended  
16 for a period of 30 days after the effective date. Which means  
17 the statute ran on January 9<sup>th</sup>, 2015. Thus B & C is barred  
18 from suing on this contract under the statute of limitations.

19 The city asks that the Court grant its motion and order  
20 that B & C dismiss the State Court lawsuit and withdraw the  
21 lis pendens. Thank you, Your Honor.

22 THE COURT: All right. Thank you, Mr. Cotton.

23 MR. COTTON: Your Honor, B & C maintains that the  
24 offer to purchase which was accompanied by a \$50,000 good  
25 faith deposit, as well as full blown development plans

1 including feasibility studies, market studies, environmental  
2 studies, architectural drawings, et cetera which were prepared  
3 by B & C at great expense as required by the City of Detroit  
4 that was and is a binding contract with the City of Detroit  
5 even though it had been -- and we agree that it was never  
6 presented to council by -- to -- to -- to obtain a resolution  
7 for entry into a development agreement.

8 And it is also true that Mr. Carmack has tried repeatedly  
9 over the years to convince council that he had a -- an offer  
10 to purchase which should be considered by that body to pass a  
11 resolution to enter into a development agreement.

12 The city argues that Mr. Anderson, I believe, appeared  
13 before council and -- and made certain representations that  
14 planning and development never took a deposit from Mr.  
15 Carmack. Well, that was false. They had never entered into a  
16 purchase agreement. That was false.

17 Part of the problem is that over the last few years given  
18 Detroit's former Mayor and his administration being of course  
19 embroiled in controversy and eventually convicted, over the  
20 years there were a series of Mayors and -- and directors of  
21 planning and development.

22 And under each administration they each told council  
23 something different and contradictory. And the crux of the  
24 matter is that Mr. Carmack who was accompanying me at the



1 Development, was solicited for a bribe and refused to  
2 cooperate. And it was then that his proposal was killed, or I  
3 don't want to say killed, it was buried and was never  
4 presented to council. In the meantime he spent thousands of  
5 dollars in preparation for the offer.

6 Now the city wants to argue that if there was a contract  
7 that it was breached when the property was originally  
8 transferred to the control or the authority of water and  
9 sewerage. Well, we disagree. We disagree. Because water and  
10 sewerage never paid for the property and the property was  
11 transferred back under the jurisdiction of planning and  
12 development by resolution.

13 It is our position that this contract was not breached  
14 until May 31<sup>st</sup> of 2015 when the city agreed to sell portions of  
15 the property to water -- excuse me, Waterfront Terminal  
16 Holdings and Revere Dock, two separate purchasers.

17 And mind you of course that they're only selling a  
18 portion of the -- the total property. The Court also asked a  
19 question as to whether or not the lis pendens was filed with  
20 the treasurer -- excuse me, Register of Deeds and it has been.

21 THE COURT: Was that done at the same time you filed  
22 the lawsuit?

23 MR. COTTON: Yes.

24 THE COURT: All right. Thank you.

25 MR. COTTON: So it's our position that this contract  
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1 was in fact executory. It is not rejected by the city in the  
2 plan of adjustment. And we cited cases which indicates that  
3 it -- because it is not rejected it continues in existence.  
4 It was not breached until recently -- recently here  
5 post-petition and therefore it does not violate the  
6 injunction. We therefore ask this Court to deny the city's  
7 motion.

8 THE COURT: You contend this contract that you say  
9 existed was breached by the city post-petition only recently.  
10 By that are you referring to the city's actions in moving  
11 forward with sale of the property to the two other purchasers  
12 recently?

13 MR. COTTON: Yes.

14 THE COURT: All right. So Mr. Cotton, what --  
15 what's your response to the city's argument that there is no  
16 contract under applicable Michigan law because the city  
17 charter required a resolution by the city council approving  
18 the sale in order for there to be a valid contract.

19 MR. COTTON: There is no -- there is no development  
20 agreement. There is not a -- a separate purchase agreement  
21 which is a separate document. But the offer to purchase  
22 accepted by the city is a valid contract under common law.

23 THE COURT: A contract to sell the property.

24 MR. COTTON: Yes.

25 THE COURT: So how is it a valid contract to sell  
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1 the property, this city owned property when there was no --  
2 never a city council resolution approving that sale.

3 I'm looking at Section 4-112 of the city charter. It  
4 says except as otherwise provided by this charter, the city  
5 may not sell or in any way dispose of any property without the  
6 approval by resolution of the city council.

7 Now under that charter provision under the case law cited  
8 by the city, doesn't that mean that the fact there was no city  
9 council approval by resolution, doesn't that mean there was  
10 never a -- a valid contract between the city and B & C for the  
11 sale of this property?

12 MR. COTTON: I am -- I am aware of the charter  
13 provision as well as the case law. As a matter of fact I'm a  
14 former city employee. However, the offer to purchase we  
15 maintain is still a binding contract between B & C and the  
16 City of Detroit that's separate and distinct from the -- if I  
17 might take a second. One second, please.

18 Attached to the city's motion itself is a copy of the  
19 purchase agreement between Waterfront Terminal and the City of  
20 Detroit. Now that is an example of the formal purchase  
21 agreement typically used by the City of Detroit to sell  
22 surplus land.

23 It's the same type of agreement that was used for the  
24 other purchaser, Revere. The -- so that -- that's the formal  
25 purchase agreement. The process of selling surplus property

1 is that the -- the city first enters into a binding agreement  
2 with the developer.

3 And that agreement is binding. Were it for the  
4 bankruptcy and had this just arisen, it would go into State  
5 Court if the city breached the offer to purchase and turned  
6 around and sold it to another person. And the city at that  
7 time would attempt to argue that it's not binding because it's  
8 -- it hasn't gone before council. But the offer to purchase  
9 is a binding legal document that gives B & C enforceable  
10 rights separate from and before the issuance of a formal  
11 purchase agreement authorized by the -- by council. Those are  
12 two separate and distinct matters.

13 THE COURT: Well, but your theory is that the offer  
14 to purchase when accepted you said that was accepted by city  
15 personnel.

16 MR. COTTON: Yes.

17 THE COURT: Your theory is that is a binding  
18 contract for the sale by the city to B & C of the real estate  
19 which is the subject of the agreement.

20 MR. COTTON: Yes.

21 THE COURT: What I'm trying to understand is why you  
22 -- why you are -- why you say that is so under Michigan law  
23 given the city charter provisions and the case law to -- that  
24 the city has cited here. And given the fact that is

1 MR. COTTON: Excuse me.

2 THE COURT: Detroit city council has never approved  
3 the sale of any of this property to your client by a  
4 resolution as required by the city charter. Why doesn't that  
5 mean that there -- there never was a valid or a binding  
6 contract for the sale of any of this property between the city  
7 and your client.

8 MR. COTTON: I would -- I would pose the question  
9 back to the city then what -- what is the purpose and effect  
10 of -- of -- of executing an offer to purchase. What it does  
11 is it supposedly it ties up the land so that the -- the -- the  
12 city will not negotiate with or -- or sell the property to any  
13 other entity. So it -- it -- it has legal effect as a  
14 contract. And the city is bound by it. I think if -- that's  
15 about all I have to say on that issue, Your Honor.

16 THE COURT: All right. Did you want to say anything  
17 else then?

18 MR. COTTON: No. I think that's sufficient.

19 THE COURT: All right. Thank you.

20 MR. COTTON: Thank you.

21 THE COURT: Mr. Swanson, you may briefly reply as  
22 counsel for the moving party if you want to.

23 MR. SWANSON: Your Honor, what -- what we haven't  
24 heard from B & C Land is that the contract was ever approved  
25 by the city council or that it didn't need to be approved by

1 city council under the law. That's because it -- it never was  
2 approved by city council. And -- and it had to be approved by  
3 city council under the charter.

4 Second, Your Honor, B & C stated it -- it hasn't alleged  
5 a -- a breach of contract on May 21, 2008. If you look at  
6 Paragraph 26 of the complaint it says, Detroit breached its  
7 obligations under the purchase agreement by failing and  
8 refusing to cooperate and negotiate in good faith.

9 Specifically Detroit has violated the purchase agreement by  
10 number three, conveying the property to the Detroit Water and  
11 Sewerage Department after the property was under contract to  
12 B & C. Paragraph 15 of the complaint states that that  
13 conveyance occurred on May 21, 2008. Thank you, Your Honor.

14 THE COURT: All right. Thank you all. I'm going to  
15 rule on this motion now.

16 The city's motion before me today seeks in the form of  
17 the proposed order that's attached to the motion, an order of  
18 this Court requiring B & C Land Development Corporation to  
19 dismiss, or cause to be dismissed with prejudice, the specific  
20 lawsuit that it recently filed in the Wayne County Circuit  
21 Court against the city that's referred to in the motion.

22 And also to withdraw from the Wayne County Register of  
23 Deeds the notice of lis pendens that the B & C Land  
24 Development Corporation filed. The city also seeks in its

1 Land Development Corporation from asserting any claims  
2 described in the State Court lawsuit, a copy of the complaint  
3 in the State Court lawsuit filed in the Wayne County Circuit  
4 Court is attached as an exhibit to the city's motion, or the  
5 alleged conduct forming the basis of the State Court lawsuit  
6 against the City of Detroit or its property in the State Court  
7 lawsuit or in any other action or proceeding.

8 The city's proposed order also has the Court -- asks the  
9 Court to order that if B & C Land Development Corporation  
10 fails to timely withdraw the notice of lis pendens that I  
11 referred to earlier, the city may file a copy of the Court's  
12 order with the Register of Deeds which will operate as a  
13 withdrawal of the lis pendens on the property.

14 I -- I have reviewed and considered carefully the  
15 arguments of the parties with -- regarding this motion, both  
16 the written papers and exhibits filed by the parties, and the  
17 arguments made in today's expedited hearing on the motion.  
18 And -- and my conclusion is that the motion must be granted in  
19 its entirety and I will do so.

20 The -- the B & C Land Development Corporation's argument  
21 in defense against the city's motion that it had as of the  
22 filing of the City of Detroit's bankruptcy petition in this  
23 Chapter 9 bankruptcy case, that is as of July 18, 2013, the  
24 petition date in this case. That -- that as of that time the

1 with the City of Detroit for the purchase by B & C Land  
2 Development from the city of the real estate which is the  
3 subject of the city's motion and of the State Court lawsuit  
4 filed by B & C.

5 That that contract was an executory contract within the  
6 meaning of Section 365 of the Bankruptcy Code, 11 USC Section  
7 365 which executory contract was never assumed or rejected by  
8 the city during its bankruptcy case and therefore survives the  
9 bankruptcy, the bankruptcy discharge, the bankruptcy plans,  
10 and the order confirming plan's injunctive provisions. And  
11 therefore B & C is entitled and -- and permitted to pursue  
12 their State Court lawsuit despite the city's confirmed Chapter  
13 9 plan in this bankruptcy case.

14 The B & C's argument however is without merit based on  
15 undisputed facts. The undisputed facts include the fact that  
16 the B & C -- while B & C alleges that it -- that the offer to  
17 purchase document and perhaps other documents between itself  
18 and the city regarding this property at issue were valid and  
19 enforceable and binding contracts between B & C and the city,  
20 that is simply not the case under Michigan law.

21 It's not the case because as the case law cited by the  
22 city demonstrates, and the city charter provision cited by the  
23 city demonstrates, there can be under Michigan law no valid  
24 contract for the sale by the City of Detroit of any real



1 resolution of the city council of Detroit.

2 Section 4-112 of the city charter says, "that except as  
3 otherwise provided by this charter, the city may not sell or  
4 in any way dispose of any property without the approval by  
5 resolution of the city council".

6 That B & C has not argued that there are any exceptions  
7 in the city charter to this requirement that the city council  
8 approve any sale of its property by resolution that would  
9 apply to the property here. B & C has not argued otherwise  
10 and that argument by the city is supported by the affidavit  
11 that the city filed -- a declaration rather under penalty of  
12 perjury of the city's James Nosedo, a member of this Detroit  
13 law department. That was attached as -- to the city's reply  
14 brief, docket 10115.

15 And so it is undisputed that under the City of Detroit  
16 charter a resolution by the Detroit city council approving the  
17 sale of the property was necessary in order for there to be  
18 the possibility of any existence of any valid binding,  
19 enforceable contract of any kind regarding the sale of this  
20 property at issue between the city and B & C Land Development.

21 It's also undisputed that there never was any such  
22 approval by city council by resolution as required by the city  
23 charter. Under the cases cited by the city the result of this  
24 is that there was -- there was and is -- there was never and

1 the city and B & C Land Development.

2 The cases that support that proposition under Michigan  
3 law include the case of Johnson v City of Menominee, 173 Mich  
4 App 690, 434 NW 2d 211 and in particular at Pages 213 and 214,  
5 a decision of the Michigan Court of Appeals from 1989. And  
6 also the decision of the United States Court of Appeals for  
7 the 6<sup>th</sup> Circuit in applying Michigan law.

8 In the case of Michigan Paytel Joint Venture v City of  
9 Detroit, 287 F 3d 527, particularly at Page -- Pages 539 to  
10 540, a decision of the 6<sup>th</sup> Circuit from 2002.

11 So there is no valid and never was a valid contract or  
12 any contract between -- enforceable contract between the city  
13 and B & C Land Development Corporation therefore -- therefore  
14 there could be no executory contract at any point and in  
15 particular as of the petition date in the Chapter 9 bankruptcy  
16 case within the meaning of Section 365 of the Bankruptcy Code.

17 So this -- so that B & C's argument that it has a -- an  
18 executory contract that -- that was never rejected in the  
19 bankruptcy and therefore survives the bankruptcy and the  
20 bankruptcy discharge and injunction in the confirmed plan is  
21 without merit. And the Court must reject that argument.

22 If and to the extent B & C Land Development can be  
23 construed as alleging in their State Court complaint that --  
24 or in their argument in responding to the city's motion here,  
25 that certain acts or omissions by the city give B & C a claim

1 under some legal theory with respect -- relating to this  
2 property under some legal theory other than breach of  
3 contract, a contract based theory such as a tort theory or  
4 some other type of theory other than contract or a theory that  
5 -- other than the theory that depends upon the existence of an  
6 enforceable and valid contract between the parties.

7 Those claims clearly are claims that arose before and --  
8 and well before the city filed its bankruptcy petition in this  
9 Chapter 9 case on July 18, 2013. And such claims therefore  
10 are discharged by the city's confirmed plan of adjustment and  
11 the discharge injunction provisions of the confirmed plan and  
12 of the Court's order confirming the plan bar B & C Land  
13 Development from pursuing those claims, either in State Court,  
14 or in the bankruptcy case, or anywhere else against the city  
15 or the city's property.

16 Those provisions -- and such -- any such claims were  
17 discharged under the confirmed plan. The provisions in the  
18 plan and the order confirming plan which the city has relied  
19 on and which support these conclusions are the discharge  
20 provision on Page 50 of the eighth amended plan which is on  
21 file and is part of docket 8272.

22 The injunction provisions in that confirmed plan which  
23 are on Pages 50 to 51 of the -- that same plan, docket 8272.  
24 And the injunction provisions in the order confirming plan

1 number 8272 beginning at Page -- Page 89 of the order  
2 confirming plan.

3 For all these reasons then, B & C Land Development does  
4 not have any claim against the City of Detroit arising from or  
5 relating to any alleged agreement with the city regarding the  
6 property at issue and does not have any claims under any legal  
7 theory any that survive the bankruptcy case and the  
8 confirmation of the plan of adjustment in this case against  
9 the city and is subject to the injunction provisions enjoining  
10 them from pursuing any such claims by litigation or otherwise  
11 under the confirmed plan of adjustment.

12 Based on that the Court will grant the motion and will  
13 order the relief that the city has requested in the motion.  
14 Mr. Swanson, do you have the proposed order in front of you?

15 MR. SWANSON: I do, Your Honor.

16 THE COURT: That's attached to your motion? I want  
17 to -- I want to talk to you about it. I want to talk about  
18 some changes, minor changes in the order.

19 The order says in Paragraphs 2 and 3 it sets a deadline  
20 for B & C to take certain action. It says within five days of  
21 the entry of this order. I'm not concerned about that -- that  
22 time frame, but instead of saying it that way in orders, I  
23 like to whenever possible to set a specific calendar date as a  
24 deadline.

1 proposed order submitted to me yet today so that I can get it  
2 filed yet today, we'll make it five days -- no later than five  
3 days after today's date, so that would be five days -- that  
4 would be no later than next Monday, August 10<sup>th</sup>. I assume you  
5 can get me this order --

6 MR. SWANSON: Absolutely.

7 THE COURT: Submit this order today. I'm going to  
8 waive presentment of the revised order.

9 MR. SWANSON: Yes, Your Honor.

10 THE COURT: All right. So make the date August 10,  
11 no later than August 10, 2015, B & C Land Development  
12 Corporation must dismiss, et cetera in Paragraph 2. Paragraph  
13 3, they must withdraw the notice of lis pendens. Paragraph 4,  
14 5, and 6 are fine as is.

15 I'll ask you to submit that order as soon as possible.  
16 I'll waive presentment as I said. And I will make every  
17 effort to review the order and get it docketed as quickly as I  
18 can after you submit it.

19 The -- I may make some minor non-substantive changes to  
20 the order, but don't worry about those, I'll take care of  
21 that. And -- and as I said, they're -- they're entirely  
22 non-substantive type things.

23 So, submit the order and the motion will be granted on  
24 that basis. That concludes today's matters on the City of

1 THE CLERK: All rise.

2 MR. SWANSON: Thank you, Your Honor.

3 MR. ELLISON: Thank you.

4 (Court Adjourned at 3:14 p.m.)

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7 We certify that the foregoing is a correct transcript from the  
8 electronic sound recording of the proceedings in the  
9 above-entitled matter.

10  
11 /s/Deborah L. Kremlick, CER-4872  
12 Jamie Laskaska  
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Dated: 8-9-15